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No. 85-430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARATHON PETROLEUM COMPANY, MOBIL OIL CORPORATION, MURPHY OIL CORPORATION, ASHLAND OIL, INC., PENNZOIL COMPANY, TENNECO OIL COMPANY and TOSCO CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

SUPPLEMENTAL BRIEF OF PETITIONERS MARATHON, MOBIL, AND MURPHY IN SUPPORT OF PETITIONERS

Of Counsel:

JOHN A. EVANS
MARATHON PETROLEUM COMPANY
539 South Main Street
Findlay, Ohio 45840
(419) 422-2121

WILLIAM C. STREETS
GAIL F. SCHULZ
MOBIL OIL CORPORATION
3225 Gallows Road
Fairfax, Virginia 22037
(703) 849-3000

H.Y. ROWE
W. BAYLESS ROWE
MURPHY OIL CORPORATION
200 Peach Street
El Dorado, Arkansas 71730
(501) 862-6411

R. BRUCE MCLEAN, P.C.
DANIEL JOSEPH, P.C.*
DAVID A. HOLZWORTH
AKIN, GUMP, STRAUSS, HAUER AND FELD
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000

Counsel for
Marathon Petroleum Company
Mobil Oil Corporation
Murphy Oil Corpuoration

* Counsel of record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Petitioners Marathon Petroleum Company, Mobil Oil Corporation, and Murphy Oil Corporation submit this supplemental brief pursuant to this Court's Rule 22.6 to take account of events that occurred too late for inclusion in the Petition.[1]

SUMMARY

The Department of Energy's Office of Hearings and Appeals, a non-autonomous agency within DOE charged with identifying and compensating persons injured by overcharges (see Pet. 21 n. 17), was asked, in other

[1] Lists of parent, affiliate, and subsidiary companies required by this Court's Rule 28.1 appear in Appendices VIII-X to the Petition.

litigation, the same question at issue in the present case: could injured persons be determined, and restitution made, where excess charges had been imposed for crude oil. The Office of Hearings and Appeals originally concluded after lengthy hearings that injury caused by overcharges for crude oil like those at issue in the present case can be traced to particular injured persons—most particularly to refiners such as petitioners, and to direct purchasers from refiners, such as utilities and airlines. Moreover, OHA has developed an administrative mechanism to effect restitution that is administratively workable, and "yields precise numbers with a high level of confidence." Supp. App. 18a. These conclusions contradict the official DOE position, adopted by the court of appeals in the present case, that it is not possible to identify persons injured or to effect restitution.

When OHA presented these findings and recommendations within DOE, they were suppressed, not because DOE found them to be mistaken in law or fact on the record before OHA, but rather because they were inconsistent with DOE's policy of claiming that restitution is impossible. DOE intends by that policy to obtain overcharge funds for the federal treasury. Because OHA is not an independent adjudicator, DOE has been able to force it to alter its views and then has reported to the court of appeals that OHA had found restitution in crude oil cases to be impossible.

When petitioners learned this information, through letters written to DOE by a Congressman who had received a copy of the original OHA report, they brought it to the attention of the court of appeals in the form of a further petition for rehearing accompanied by a motion for leave to file the petition out of time, both filed on October 3, 1985. The motion and further petition pointed out that this information had not been available to the court of appeals when it made its decision on rehearing. The court of appeals denied the motion for

leave to file by order of October 23, 1985. Supp. App. 1a.

These events support the petition for certiorari in two fundamental ways: They further demonstrate that the court of appeals was wrong in denying petitioners and others a hearing for the purpose of establishing injury and claims to the overcharge funds—a hearing that this Court's decisions require (Pet. at 12, 20). Moreover, they support the view that governments who have not established injury are not proper claimants for restitutionary funds, since that possibility has led the federal and state governments here to favor their own interests over those whom they are by law required to protect.

SUPPLEMENTAL FACTS

1. In the Petition, at page 21 fn. 17, we referred to *In Re: Department of Energy Stripper Well Litigation*, 578 F. Supp. 586 (D. Kan. 1983), in which the District of Kansas referred to OHA the factual questions of who had been injured by charges of market rather than controlled prices for certain crude oil (charging of the market price had there been permitted by preliminary injunctions that were later overturned). That case, which involves over $1.2 billion, is one in which the DOE is arguing, on the basis of the decision in the present case, that the funds should go to the federal treasury. See Petition at 13-14, fn. 8. In furtherance of its position, the DOE submitted to that court and to the court of appeals in the present case documents purporting to represent OHA's findings and DOE's "policy statement" on those questions. Those are briefly discussed in footnotes 17 and 8 of the Petition.

2. On September 3, and 23, 1985, Rep. John D. Dingell, Chairman of both the House Committee on Energy and Commerce and its Subcommittee on Oversight and Investigations, sent remarkable letters to the Deputy Secretary of Energy. Rep. Dingell reported that OHA had originally made findings, conclusions, and recommenda-

tions quite different from those that DOE publicly issued and supplied to the District of Kansas and the court of appeals in the present case. OHA's original findings are contained in a draft report, of which DOE had sent Rep. Dingell a copy but which DOE is withholding (in his view, without justification) from the courts and the public. Petitioners thus do not have a copy of the full original report.[2] Supp. App. at 4a-5a.

This original OHA report was drastically altered as a result of policy-level DOE meetings, and what DOE publicly presented as OHA's views was the altered version. Rep. Dingell's second letter, dated September 23, further quotes the original OHA report and provides additional details of the changes substituted at the direction of DOE officials for the OHA's original views. Supp. App. 16a ff.[3]

There are two major revelations in Rep. Dingell's letters directly concerning petitioners, who are domestic refiners, and their customers. First, a quotation from the original OHA report shows that OHA found that domestic refiners "absorbed a portion of the overcharges and should be compensated." Supp. App. 6a. OHA also found that "consumers of refined petroleum products, such as utilities and airlines, that purchased product directly from

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[2] Petitioners are therefore unable to comment on the portions of OHA's original report not quoted by Rep. Dingell. However, the quoted portions establish that OHA concluded that identification of injured persons could be achieved, that refiners and their direct customers were injured, and that an accurate and practical mechanism for restitution is possible. It is on those quoted portions that we rely here.

[3] A copy of Rep. Dingell's September 3 letter was obtained by undersigned counsel late on September 9. The Petition was due to be filed on September 14. While it may have been possible to include some mention of that letter in the Petition, we thought it appropriate to apply first to the court of appeals, and we informed the Clerk of this Court of that possibility in the cover letter accompanying the Petition. Of course DOE's response to Rep. Dingell and the Congressman's second letter, dated September 19 and 23, were not written until after the Petition had been filed.

refiners" could and should be compensated as well. *Id.* A further quotation reveals that, based upon its analysis of the economic data, OHA found that "marginal economic analysis [the method of economic analysis considered by OHA at the hearing that OHA found most helpful] answers the appropriate question in this proceeding, namely, to what extent did product prices rise when the refining industry experienced a small crude oil cost increase." Supp. App. 18a. OHA concluded that this analysis "yields precise numbers with a high level of confidence." *Id.* This is exactly the opposite of the conclusions that the court of appeals accepted at DOE's urging. Ex. App. 88a ff.[4]

Second, OHA's original report included "recommendations for a restitutionary mechanism which can be implemented efficiently." Supp. App. 6a. OHA reports that this mechanism is "administratively workable," that it "provides for processing of refund applications" filed by crude oil purchasers, refiners, and "consumers of refined petroleum products that purchased those products directly from refiners." Supp. App. 20a. Such applications "can be accepted promptly upon announcement of a payment proceeding." *Id.* at 20a-21a. Thus, the portions of the original OHA report quoted by Rep. Dingell make clear that the OHA concluded that restitution was practically, as well as theoretically, possible. OHA felt itself ready, willing, and able to take on the task.

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[4] The OHA hearings did not take evidence on whether resellers, retailers, and their purchasers were injured and could be compensated, leaving that question for further hearings. Supp. App. at 6a.

Similarly OHA refused to take evidence on injury to specific refiners, leaving that question as well to future hearings. DOE's observation, in its "policy statement", that injury to individual refiners had not been established (50 Fed. Reg. at 27401) is therefore misleading. The fact that OHA recommended a mechanism for compensation of individual refiners shows that the Office concluded that individual determinations were possible.

DOE's response to Rep. Dingell's first letter actually confirms his allegations (Letter of Sept. 19, 1985, Supp. App. 10a ff.). DOE did not dispute that OHA originally reached all the conclusions that Rep Dingell asserts. Indeed, DOE admitted that on the basis of the evidence before it OHA both concluded that identification of persons injured by crude oil overcharges is possible and recommended a mechanism for restitution. Supp. App. 10a-11a. DOE further admitted that it changed OHA's recommendations "as a matter of policy," supporting that change with a citation to TECA's conclusion in the present case that the task is impossible. *Id.* at 11a, 12a.

On October 3, 1985, petitioners Marathon, Mobil, and Murphy sought to bring these matters to the attention of the court of appeals by filing a further petition for rehearing and a motion for leave to file that further petition out of time. We pointed out that none of this information had been available to the court of appeals when it made its decision in the case. The motion for leave to file out of time was opposed by the DOE and by 27 states. The DOE's opposition sought to make a virtue of necessity. It stressed that OHA is not autonomous, and that OHA's original decision was of course subject to review by policy officials like the Secretary or the General Counsel. Supp. App. 25a.[5] In so arguing the DOE reinforced the conclusion stated in its letter to Rep. Dingell that OHA's original findings and recommendations, based on a hearing record, were required to be altered only for "policy" reasons—because the government prefers getting overcharge funds itself over having injured persons identified and restitution paid to them. The court of appeals denied the motion for leave to file the further petition out of time by a one-sentence order containing no explanation on October 23, 1985. Supp. App. 1a.

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[5] The supplemental appendix contains an excerpt from the DOE's opposition. A full set of the petitioners' motions and the oppositions of the DOE and the states has been lodged with the Clerk.

SUPPLEMENTAL REASONS FOR GRANTING THE PETITION

This supplementary information strongly supports the petition for certiorari.

1. These events underscore the correctness and applicability of this Court's holdings insisting that a court should hold a hearing participated in by all persons claiming injury before deciding a remedy issue such as the present. Petition at 12, 20. If OHA, after taking evidence on this subject, thought that identification of injury and an appropriate remedy are possible, then it was even more plainly wrong for the court of appeals to deny persons claiming injury the opportunity to submit evidence to prove it. Nor do we assert that the original OHA report (or the portion of it quoted by Rep. Dingell) is conclusive in itself. Rather, this information underscores the correctness of the requirement that the issues of injury should not be held to be foreclosed without opportunity for a hearing. The evidence that originally convinced OHA might well convince a tribunal that is not obliged to defer, off the record, to one of the claimants.

2. It can be seen from these events that the government's hopes and plans of ending up with crude oil overcharge funds are not only in apparent conflict with, but have actually supplanted, any attempt by the government to pursue its duty of enforcing the law so as to identify and compensate those injured by the overcharges. An agency truly attempting to pursue those goals would not have squelched and hidden a report of the sub-agency most expert in such matters, made after a lengthy hearing, concluding that identification of persons injured and accurate restitution were possible. The conflict between impartial enforcement on the one hand and the possibility of adding funds to the government's coffers on the other, identified in *Tumey v. Ohio*, 273 U.S. 510, 534 (1927), is unfortunately not merely apparent, but real. The court

of appeals failed to perceive that the government's plan to end up with the money gives it a financial interest in defeating the very claims that by law it should be using its power and expertise to vindicate. This Court should grant certiorari to establish that for this reason, absent a statute or injury to itself, the government cannot become a claimant in restitution.[6]

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[6] In the present case the states, rather than the federal government, are the beneficiaries of the judgment. That does not change the need for review. First, the states are themselves unauthorized by statute to claim the funds and are not entitled to restitution because they have not even sought to show injury (see Petition at 15-16). Moreover, the DOE's dual role is still more than sufficient ground for reversal. The court of appeals has endorsed a general proposition that governments may claim restitutionary funds, clearly leaving the door open to the federal government as a claimant in future cases (Ex. App. 92a). DOE is, admittedly, pushing on toward that goal, and the decision of the court of appeals in the present case is already being used by DOE to support that effort. See p. 6 *supra*. It is only because the possibility of even attempting restitution to injured persons has been eliminated by the present holding that the federal government is able to pursue its goal of obtaining awards in future cases. See the DOE's "Policy Statement", 50 Fed. Reg. 27400, 27402, Col. 3 (July 2, 1985), discussed in the Petition at 13. Indeed, the Office of Hearings and Appeals, under the overt compulsion of the "Policy Statement", simultaneously and dutifully announced that it is awarding all crude oil overcharges to the federal government. *Id.* at 27402-03. See Pet. 20-21.

CONCLUSION

For the foregoing reasons, in addition to those given in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Of Counsel:

JOHN A. EVANS
MARATHON PETROLEUM COMPANY
539 South Main Street
Findlay, Ohio 45840
(419) 422-2121

WILLIAM C. STREETS
GAIL F. SCHULZ
MOBIL OIL CORPORATION
3225 Gallows Road
Fairfax, Virginia 22037
(703) 849-3000

H.Y. ROWE
W. BAYLESS ROWE
MURPHY OIL CORPORATION
200 Peach Street
El Dorado, Arkansas 71730
(501) 862-6411

R. BRUCE MCLEAN, P.C.
DANIEL JOSEPH, P.C.*
DAVID A. HOLZWORTH
AKIN, GUMP, STRAUSS, HAUER AND FELD
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000

Counsel for
Marathon Petroleum Company
Mobil Oil Corporation
Murphy Oil Corpuoration

* Counsel of record

SUPPLEMENTAL APPENDIX

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TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

Nos. DC-91 through DC-100

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EXXON CORPORATION,
Defendant-Appellant.

Before: HONORABLE WILLIAM H. BECKER, HONORABLE WESLEY E. BROWN and HONORABLE ROBERT EARL MAXWELL, Judges.

ORDER

Upon consideration of Intervenors-Appellants, Marathon Oil Company, Mobil Oil Corporation and Murphy Oil Corporation, motion for extension of time to file a petition for rehearing, time having expired as designated in Rule 40, Federal Rules of Appellate Procedure, and oppositions to said motion filed by Appellee, the United States of America, and by Intervenor-Appellee, "The States," it is hereby

ORDERED that said motion is DENIED.

FOR THE COURT:

/s/ Donna M. Bold
DONNA M. BOLD
Clerk

October 23, 1985

U.S. HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
OF THE
COMMITTEE ON ENERGY AND COMMERCE
Washington, DC 20515

September 3, 1985

Honorable Danny J. Boggs
Deputy Secretary
Department of Energy
Forrestal Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Mr. Boggs:

Thank you for your August 20, 1985 reply to my letter of July 30 in which I expressed considerable disagreement, based on the record of investigations by this Subcommittee and the General Accounting Office (GAO), with the June 21, 1985 "Statement of Restitutionary Policy" issued by you in conjunction with the issuance by the Department of Energy's (DOE) Office of Hearings and Appeals (OHA) of its June 19 report concerning the *Stripper Well* litigation.

It is disturbing that you and the DOE counsel do not want to present to the court a complete story concerning DOE's restitutionary practices, together with the views of the Chairman of the House Committee with legislative and oversight jurisdiction over your Department and this program. Presenting one side only misleads the court and could cause the court to decide on the mistaken belief that Congress and the DOE are in accord with this matter. I urge you to reconsider this matter before September 16.

As part of your reconsideration, I urge you to consider the following comments.

As you know, as long ago as March 14, 1985 I wrote to the Secretary of Energy (copy attached) about the OHA report and expressed concern about the status of the OHA report. In that letter, I said:

> If, despite this letter, anyone at DOE reviews or coordinates the OHA report, the Subcommittee expects to receive from OHA not only the final version, but also the OHA draft version, and from the DOE, the identity of all persons inside or outside DOE who reviewed the OHA draft report. No one should destroy the evidence this time.

After receiving an April 2 reply from Mr. Rayburn Hanzlik in which he indicated that an "internal review process" of the OHA Secretary on April 9 (copy enclosed). I said:

> The Subcommittee specifically reiterates its earlier request that each draft of the report (including any recommendations)that is made available to *anyone* outside of OHA be retained and provided to the Subcommittee after the report is issued.

I subsequently learned through our investigation of this matter that a draft report was prepared by OHA and given, as part of the "internal review process" dictated by DOE officials, to several such officials in early April. I also learned that DOE officials met in April and early May regarding this report. At those meetings, these officials made their views known to the OHA about the report.

Subsequently, the DOE received an order dated May 7, 1985 from the court confirming the claims in my March and April letters, that this was to be a report by OHA, not DOE. Accordingly, on June 13, 1985 Secretary Herrington wrote (copy enclosed) assuring me that DOE will comply will the court's order. He said:

> OHA will report the results on its fact-finding on the tracing of the overcharges without editing or

> modification by other parts of the Department. The Department will also provide its recommendations to the court, but the exact way in which this will be done has not yet been finally determined.

Unfortunately, as I show in this letter, the damage was done *before* issuance of the court's order. The OHA had been beaten into submission by the "internal" process described by Mr. Hanzlik. Its draft report was not liked by the DOE officials. This was understood by OHA and it was re-written to be a more bland report with a fact finding more to the DOE's liking.

When the report was issued in June, Mr. James U. DeFrancis of the DOE provided a copy to the Subcommittee by letter of June 24. On July 30 I wrote Mr. DeFrancis (copy attached) thanking him for the report and reminded the DOE of my earlier request for copies of the draft OHA report and the identity of the officials outside OHA who received that draft. On August 20 the OHA wrote to me "in response" to my letter to Mr. DeFrancis and provided a copy of the draft report.

The OHA said:

> Only one draft was circulated to persons outside of the Office of Hearings and Appeals. On April 1 1985, we provided five copies of this draft to the Administrator and Deputy Administrator of the Economic Regulatory Administration. Subsequently, we supplied one copy of the draft to the Assistant Secretary for Congressional, Intergovernmental and Public Affairs. We understand that ERA subsequently provided copies to the Office of General Counsel and to the Deputy Secretary.
>
> A copy of this draft is enclosed. The information contained in this document is of a sensitive nature, representing the predecisional processes of the agency, and is exempt from mandatory public disclosure pursuant to Exemption 5 of the Freedom

> of Information Act, 5 U.S.C. Sec. 552(b)(5). We request that the Subcommittee exercise special care in the storage and handling of this draft to ensure its confidentiality and to protect against disclosure.

Let me state first that I disagree with the DOE claim of exemption from public disclosure, as this report was always to be a reply to a court order. *No* agency "pre-decisional process" was intended by the court (as is clear by the court's May 7 order which was nothing more than a restatement of its first order), although the DOE and OHA *improperly* went thru such a process prior to the May 7 order. Indeed, there never should have been any such "internal review process". No DOE policy was involved. DOE was free to adopt whatever policy, position, or decision it wanted separate from the court-ordered report. The Freedom of Information Act was not intended to exempt from disclosure documents of this nature. The OHA misapplies the Act in this case.

In regard to the draft OHA report, it is substantially different in content, substance, and tone (from introduction to end) from the final OHA report. Indeed, the very first paragraph of the "Introduction" of the draft report differs (after the second sentence) from the public report.

The public report states:

> On May 7, 1985, the District court issued an order which clarified the manner in which the fact-finding report from OHA was to be submitted. *In re: The Department of Energy Stripper Well Exemption Litigation*, MDL No. 378 (D. Kan., May 7, 1985) (order denying motion to expedite issuance of OHA's report). In that decision, the court ordered the OHA to issue its findings of fact of the tracing and impact of the overcharges in one separate report editing or modification by the DOE. *Id., slip op.* at 7. Recognizing that the DOE's position on the

utility of further efforts by the OHA and a recommended plan of restitution was a matter of agency policy, the court directed that these concerns be addressed in a second report "which shall be issued separate from the report of the OHA's fact-findings." *Id.* This report sets forth the OHA's analysis and findings of fact regarding the absorption of the impact of these crude oil overcharges by the U.S. domestic refining industry.

The draft report states:

> This report sets forth findings of fact regarding the absorption of the impact of crude oil overcharges by the U.S. domestic refining industry. The ultimate conclusion is reached that members of the refining sector of the domestic petroleum industry absorbed a portion of the overcharges and should be compensated. It also includes recommendations for a restitutionary mechanism which can be implemented efficiently. The refund mechanism which is recommended to the court would apply to refiners, other Entitlements Program participants, and consumers of refined petroleum products, such as utilities and airlines, that purchased product directly from refiners. It does not cover resellers or purchasers of products from resellers.

Most importantly, the OHA Findings of Fact set forth in the public report differ from those in the nonpublic draft. Further, a whole chapter entitled "V. Standards for the Fact-Finding Process" is omitted in the final report. In addition, the public report ends with the Findings of Fact, i.e. chapter VI. The draft report does not. It includes another chapter entitled "VIII. Recommendation of Restitutionary Mechanism."

All of these changes were apparently made as a result of the negative attitude expressed by DOE officials, such as yourself, after April 1 to the draft OHA report

as part of DOE's improper "internal review process". OHA, which, of course, is *not* truly independent of the Deputy Secretary, the General Counsel or other DOE officials, apparently caved under the pressure exhibited through this negative attitude of DOE officials and rewrote the draft to de-tone it, eliminate two whole chapters, and *change the findings*. The very thing I feared and predicted in my correspondence in March and April occurred. In my view, that action (under your auspices and other DOE officials) was in violation of both the spirit and words of both court orders.

The OHA was not allowed to be a free agent. Indeed, OHA personnel were, as expected, "good soldiers" and adhered to the DOE policy-line, i.e. bring this program to an end, do nothing to require more resources that could extend the program, and most importantly, use these funds to reduce the Federal budget deficit in the name of restitution. OHA had no choice because OHA lacked support at DOE for a refund policy.

I again request that you provide before September 16 a copy of my letter of July 30 to the court, together with this letter, and a copy of the OHA draft report.

Such disclosure is necessary not because the final report failed to include OHA's draft Chapter VIII, although I believe it properly should have been included because (despite OHA's mistaken characterization of the chapter as "policy") it informs the court on how to implement an administrative refund process, but because the fact finding of OHA was changed even slightly and a whole chapter relating to that fact finding was deleted after the OHA released the report to you and other DOE officials. Once that change occurred, the report lost its character as an OHA report, even though the mechanics of change were undoubtedly done by OHA and not the DOE officials. The DOE officials' interference did not stop at chapter VIII. It extended to the body of the report and the Findings of Fact. The court needs to be

aware of this. Even with this knowledge, the court may adopt your policy. But without it, the court will be misled by the public report.

In addition, I request that you provide:

(a) a list of *all* persons within DOE (other than OHA) and at other agencies who received a copy of the April 1 draft or any later draft,

(b) a list of the dates of all meetings concerning this report and the identity of the participants,

(c) an explanation why the assurances provided by the Secretary to me were apparently ignored by DOE officials in regard to this draft, and

(d) a copy of all memoranda, notes, and other documents (including marginal notes on each copy of the draft) prepared by DOE officials outside OHA regarding this report.

In conclusion, it is not my intention at this time to release this draft report. I believe that the OHA and DOE has an obligation to do so. But I will consider that view, depending on your response to me, after September 16. I understand that the court has set September 22 as the next date for briefing on these matters. Clearly, the court should be informed of these matters by then.

Sincerely,

/s/ John D. Dingell
JOHN D. DINGELL
Chairman
Subcommittee on
Oversight and Investigations

Enclosures (4)

cc: Honorable Philip R. Sharp Chairman
Subcommittee on Fossil and Synthetic Fuels

Honorable Edward J. Markey, Chairman
Subcommittee on Energy Conservation and Power

Honorable James T. Broyhill,
Ranking Minority Member
Subcommittee on Oversight and Investigations

Honorable James A. McClure, Chairman
Senate Committee on Energy and Natural Resources

Honorable J. Bennett Johnston,
Ranking Minority Member
Senate Committee on Energy and Natural Resources

Honorable William H. Gray III, Chairman
Committee on the Budget

Honorable Sidney R. Yates, Chairman
Subcommittee on Interior and Related Agencies
Committee on Appropriations

Honorable John S. Herrington, Secretary
Department of Energy

Honorable Joseph R. Wright, Jr., Acting Director
Office of Management and Budget

Honorable Charles A. Bowsher, Comptroller General
General Accounting Office

Honorable John Carlin, Chairman
National Governor's Association

Honorable Francis X. Bellotti
Attorney General of Massachusetts
President
National Association of Attorneys General
444 North Capitol Street, N.W., Suite 403
Washington, D.C. 20001

Honorable Rayburn Hanzlik, Administrator
Economic Regulatory Administration

Honorable George B. Breznay, Director
Office of Hearing and Appeals
Department of Energy

[SEAL]

THE DEPUTY SECRETARY OF ENERGY
Washington, D.C. 20585

September 19, 1985

Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your letter of September 3, 1985, concerning the *Stripper Well* litigation.

Your letter again expresses your disagreement with the Department's position regarding the remedy in the *Stripper Well* litigation, notes that the final Office of Hearings and Appeals (OHA) Report differs in some respects from the April 1 draft, and questions the propriety of the changes made by the OHA. You have also renewed your request that the Department present to the Court both your views concerning the remedy in this case, and the initial draft of the court-ordered report prepared in OHA that was furnished to you previously (the April 1 Draft) which contained, in addition to draft findings of fact, draft recommendations for further administrative proceedings.

Initially, I would like to address the concern you directed to the changes that OHA made between its initial draft and the final report. While, as you note, the tone may differ, the substance of the factual findings is exactly the same. When the District Court in the *Stripper Well* litigation issued its May 7, 1985 Order requiring the OHA Report to be confined to fact-finding and

the Department to submit its policy recommendation separately, it became necessary for OHA to revise the April 1 Draft. This was because OHA had initially drafted a single report that had interwoven OHA's factual findings with OHA's initial suggestions as to possible policy recommendations that might be adopted by the Department as a whole.

In accordance with the Court's May 7 Order, OHA then proceeded to make such changes as it deemed necessary to prepare a final fact-finding report and to delete from its report any policy or other recommendations. Any particular changes in fact-finding, which are minor, we are assured by OHA resulted solely from its normal internal review and simply reflect the preliminary nature of the April 1 draft. Indeed, the particular changes you called to my attention in your letter are on their face policy recommendations, not factual findings. This is indicated by the title of Chapter VIII of the April 1 Draft, "Recommendation of Restitutionary Mechanism." Similarly, the Introduction to the April 1 Draft, also quoted in your letter, uses the word "recommendation" twice and the recommendatory wo d "should" once in its five short sentences. Given the Court's May 7 Order, such recommendations and policy decisions simply had no place in the fact-finding re ort. The changes that OHA made to confine itself to the facts that it found on the record of its proceedings were made to comply with Judge Theis' Order.

Whatever few changes made to the substance of the factual determinations as OHA proceeded from the April 1 Draft to the final Report were made entirely within OHA and without review, approval or other such involvement by persons outside OHA. I am assured by the Director of the OHA that the findings of fact were made in strict compliance with the Court's May 7 Order.

The final policy recommendations, on the other hand, were those of the Department as an institution, which is

what the District Court ordered. Based on the facts found by OHA, the Department as a matter of policy rejected the proposal in the April 1 Draft to conduct further proceedings in an attempt to do the impossible. This decision is set forth in the Department's Statement of Restitutionary Policy and is consistent with the views of the Temporary Emergency Court of Appeals (TECA) as expressed in *United States v. Exxon Corp.*, Nos. DC-91 through DC-100 (July 1, 1985), where the Court held that any effort to trace increased crude oil costs attributable to the similar overcharges in Hawkins Field "would be futile" (Printed Slip Op. at 92), and "impossible" (*id.* at 94).

For convenience of reference, the responses to your specific questions follow the alphabetic designation assigned in your letter.

(a) The Director of the Office of Hearings and Appeals advises me that only the April 1 Draft was given to anyone outside OHA. Other than the copy which was sent to your Committee, no copy of the April 1 Draft was given to any person outside the Department of Energy. Within the Department, copies were provided to me; to the Assistant Secretary for Congressional, Intergovernmental and Public Affairs; the Administrator and Deputy Administrator of the Economic Regulatory Administration (EPA); the Director of Enforcement, ERA; the Chief Counsel for Administrative Litigation, ERA and a member of his staff; the Chief Counsel for Judicial Litigation, ERA, and several members of his staff; the General Counsel; the Deputy General Counsel; and the Acting Deputy General Counsel for Litigation and several members of her staff. Each has indicated that he or she caused no circulation outside the group named.

(b) There were numerous meetings among various of the persons listed in (a), above, to discuss the Report and the Statement of Restitutionary Policy, and it is not feasible to attempt to reconstruct all such meetings. We

did not learn of the Court's Order until May 13, when we received a copy in the mail. Prior to that time, there were two meetings involving representatives of the Office of Hearings and Appeals and DOE officials outside that office at which the April 1 Draft was discussed. The first meeting on May 7 involved me and representatives of most of the offices listed in (a), above. The second meeting, on May 10, was attended by me and the Director of Hearings and Appeals. There were no discussion meetings outside OHA subsequent to learning of the Court's Order.

In the week of June 17, before issuance of the final report, the Director of OHA advised me, the Assistant Secretary for Congressional, Intergovernmental and Public Affairs, and the General Counsel that the final report had been prepared in compliance with the Court's May 7 Order and would be issued prior to the Court-imposed deadline.

(c) As noted above, the Director of OHA advises me that OHA's findings of fact contained in its Report were prepared in strict compliance with the Court's Order without editing or modification by other parts of the Department and are based solely upon the record of the proceeding OHA conducted. Thus, no DOE officials ignored the assurances in the Secretary's letter of June 13.

(d) We have found no memoranda, notes or other documents (or copies of the April 1 Draft containing marginal notes) prepared by DOE officials outside OHA regarding the Report.

Your letter raises two other matters that I should address:

First, we must again respectfully decline your request that we file your letters (or drafts of the report) with the Court. Courts have repeatedly held that the views of individual members of Congress, even if they are committee chairmen, are to be given no weight in construing

or applying Federal law, except as they may be part of pre-enactment commentary on legislation being enacted, so that the Courts can discern the views of the Congress as a body at the relevant time of its adoption of legislation. In any event, counsel for the refiner-plaintiffs in the *Stripper Well* litigation attached a copy of your September 3 letter to their Motion to Amend Scheduling Order filed with the Court on September 12, 1985. Your July 30 letter is referred to in the September 3 letter and if those who agree with your position believe it helpful to them they will, no doubt, call it to the Court's attention. In this manner, both your position and the General Accounting Office's (GAO) recommendations on the appropriate way to make restitution were called to the attention of the court in *United States v. Exxon Corp.* (See letter to the Clerk of Temporary Emergency Court of Appeals from counsel for the National Oil Jobbers Council and the Jobber's Group dated March 13, 1985). Additionally, the question of whether the April 1 Draft should be made available to the parties is now before the Court on a discovery motion, and that matter will be decided in the litigation.

Second, I urge once again that you maintain the confidentiality of the April 1 Draft in your possession which contains neither the final views of OHA nor of the Department. The courts repeatedly have held that drafts are inherently predecisional and hence not subject to disclosure under the Freedom of Information Act. The fact that OHA prepared the report in a capacity that the Court has suggested is similar to that of a Special Master does not change this result. There is no basis to claim that drafts of judicial opinions or special masters' reports are subject to disclosure. A general practice of disclosing drafts would make government employees less apt to put into writing their initial, tentative views. The deliberative process would be seriously impaired as a result.

Finally, I reiterate our continued belief that further legislative guidance concerning the disposition of overcharge funds that cannot be traced to the parties injured is most desirable. The Policy Statement to which you object proposes to defer unilateral action by the Department under current law in order to afford Congress a further opportunity to address this matter. The crude oil overcharge funds would be deposited in the United States Treasury only if Congress declines to act. The Department is more than willing to work with the Congress to obtain appropriate legislation on this matter. We hope that you will work with the Department to develop a prompt, sure remedy that serves the public interest.

I trust these responses will allay any concern that you might have had regarding the process by which the OHA Report was prepared, for all of its factual findings were entirely the products of OHA's independent formation and review of its record in this matter.

Sincerely,

/s/ Danny J. Boggs
DANNY J. BOGGS

cc: Honorable James T. Broyhill
Ranking Minority Member

U.S. HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
OF THE
COMMITTEE ON ENERGY AND COMMERCE
Washington, DC 20515

September 23, 1985

Honorable Danny J.Boggs
Deputy Secretary
Department of Energy
Forrestal Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Mr. Boggs:

Except to the extent your September 19, 1985 reply to my September 3 letter identifies the numerous persons (outside the Office of Hearings and Appeals (OHA)) who were given copies of the April 1, 1985 OHA draft *Stripper Well* report and lists some of the "numerous meetings" by you and others in the Department to "discuss the Report and the Statement of Restitutionary Policy", your letter is somewhat misleading. Let me explain why I believe that to be the case.

First, you agree that the final OHA report and the April 1 draft "differ" in tone, but you contend that the "substance of the factual findings is exactly the same." Your interpretation and mine of what is encompassed by the word "substance" may differ. However, I believe it relevant to point out that the "words" and "emphasis", not just "tone", were changed significantly. For example, the publicly released June 1985 report states (pp. 77-78):

> Each of the methods presented for determining who bore the impact of the MDL 378 overcharges is subject to valid criticisms. One of those methods—refiner per-barrel profit analysis—is not relied upon

in this Report, except as part of the "big picture." The other—an analysis of refiner cost banks—is relied upon only to the extent that the absence of cost banks indicates complete passthrough of the impact of MDL 378 overcharges. Although marginal economic analysis rests upon assumptions and estimations, we find that the use of marginal economic analysis with econometric estimation techniques provides the best possible indication of the extent to which the domestic refining industry bore the impact of the MDL 378 overcharges. Unlike the other methods suggested by some parties, marginal economic analysis answers an appropriate question, namely, to what extent did product prices rise when the refining industry experienced small crude oil cost increase. It does not, however, answer the question with respect to any particular firm. As noted previously in this report, to determine the extent to which a particular refiner passed through the impact of the MDL 378 overcharges, a number of factors specific to the operations of that refiner must be analyzed. We know of no methodology that would accomplish analyses of those factors, and no party in this proceeding has suggested such a methodology. Marginal economic analysis analyzes industry-wide data and produces results which estimate the *average* amount of cost absorption by refiners as a class. The impact sustained by individual refiners will, of course, vary from the industry-wide average.

The comparable paragraph in the non-public April 1 draft report is shorter. It states (p. 73):

> Each of the methods presented for our use to determine who bore the impact of the MDL 378 overcharges is subject to valid criticisms. One of those methods—refiner per-barrel profit analysis—is not relied upon in this determination, except as part of the "big picture." The analysis of refiner cost banks

> is relied upon only to the extent that the absence of cost banks indicates complete passthrough of the impact of MDL 378 overcharges. We find that the use of marginal economic analysis with econometric estimation techniques provides the best possible indication of the extent to which the domestic refining industry bore the impact of the MDL 378 overcharges. Unlike the other methods suggested by some parties, marginal economic analysis answers the appropriate question in this proceeding, namely, to what extent did product prices rise when the refining industry experienced a small crude oil cost increase. It also yields precise numbers with a high level of confidence.

Whether these and other changes in words and emphasis are "substantial" or not is a question for all to judge (particularly the Court), not just the Department of Energy (DOE). You are asking the Court, the parties, the public and this Subcommittee to accept your judgment on faith of what is substantial. But your judgment is colored by your desire to have your policy adopted. By keeping the contents of the draft locked up at DOE, you want to leave all in the dark as to alternatives. I believe the Court and the public, not you, should decide this matter.

I point out one word change in the above paragraphs that, I believe, changes the emphasis significantly. The fifth sentence of the both paragraphs is virtually identical. The difference lies with a change of an article "an" to "the". Thus, the public report states the "marginal economic analysis answers *an* appropriate question", while the draft states it "answers *the* appropriate question". Is that "minor"? Is the "substance exactly the same"? The court could easily conclude "No it is not," particularly in light of other changes in the paragraph.

There are other significant changes in the findings. Most importantly, chapter V (deleted in the final version)

indicates the standards used by the OHA in its fact-finding. Your letter does not discuss that deletion. I feel certain that the Court, the parties, and the public would welcome this information and consider it "substantial" to the fact-finding.

Second, you state:

> Whatever few changes made to the substance of the factual determinations as OHA proceeded from the April 1 Draft to the final Report were made entirely within OHA and without review, approval or other such involvement by persons outside OHA. I am assured by the Director of the OHA that the findings of fact were made in strict compliance with the Court's May 7 Order.

Clearly, there were far more than a "few changes" to the entire report, even though all such changes were, as you state, "technically" made "within OHA". While I am certain that the OHA Director honestly believes that the findings were "in strict compliance" with the Order, the fact remains that between April 1 and May 7, the DOE had ample opportunity, as your letter shows, to "influence" the changes. The May 7 and 10 meetings were clearly fresh in the OHA Director's mind when the changes were made. The dye was cast by the time you and he learned of the May 7 Order. DOE did not like OHA's report or any recommendation for further proceedings. The Treasury's solution was the DOE policy. The report needed change to allow that policy. Indeed, *all* of the changes seem to coincide neatly with that view as expressed in your June policy statement. By indirection, the OHA Director re-worked the draft to make it bland and "in synch" with your "policy".

Third, your letter interprets the Court's May Order very conservatively by saying: "Given the Court's May 7 Order, such recommendations and policy decisions simply had no place in the fact-finding report." Earlier your

Department bent over backwards to interpret the Court's first Order liberally as giving DOE wide leeway to review the report and make changes.

However, the May 7 Court Order did not change the earlier Order of the Court where, as noted by OHA in the draft report, the Court said it "will also welcome the views of the OHA on how restitution can best be achieved in this case." The Court encouraged OHA to make recommendations or views on restitution. OHA did so in the draft report which you are seeking to withhold from the Court and the public. The May 7 Order supplemented the 1983 Order. It did not change it. It made clear, however, that review and change by DOE was improper.

In the May 7 Order, the Court said:

> This Court referred this legislation to the OHA only to take advantage of the procedures and expertise which the OHA had developed in tracing the impact of overcharges on the oil industry. This litigation was referred to the OHA for its determination of which parties had suffered injury in what amounts. That determination is solely a question of fact. *The Court did not intend to allow the DOE to make the policy decisions on whether such an attempt at tracing is feasible or how to actually make restitution, although the Court is interested in the DOE's position on these matters.* (Underlining supplied)

Chapter VIII of the April 1 draft OHA report states:

> *The following sections present a restitutionary mechanism to implement the factual findings contained in this determination which we believe is administratively workable.* The mechanism provides for the processing of refund applications filed by direct purchasers of MDL 378 crude oil, Entitlements Program participants, and consumers of refined petroleum products that purchased those products directly from refiners. These applications can

be accepted promptly upon announcement of a payment proceeding. We recognize that this undertaking will require the dedication of significant resources. *If directed by this Court, the Office of Hearings and Appeals is ready to assist in this endeavor.* (Underlining Supplied)

While the Court may disagree, I believe that the OHA recommendation is, in effect, an OHA view on "how to actually make restitution", based on its fact-finding. So long as you refuse to allow OHA to release its draft, the Court will never have the opportunity to agree or disagree. Again, I urge that, as a minimum, you release the April 1 draft to the Court. Let the Court decide its value.

Since receiving your September 19 letter, I received the enclosed September 12 Order by Judge Frank G. Theis. Strangely, you mention that the "question of whether the April 1 Draft should be made available to the parties is now before the Court on a discovery motion," but you did not mention the September 12 Order. Please provide a copy of your reply to that Order.

In view of the fact that the Court is now aware of the April 1 draft and has issued the September 12 Order, I will not, at this time, release the draft report. I am not, however, convinced by your arguments for nondisclosure and will probably release the draft report if you do not furnish it to the Court pursuant to the September 12 Order. I believe your reasons for wanting to retain "confidentiality" have nothing to do with protecting even a modicum of the "deliberative process," but are aimed at preserving your Federal deficit cutting, nonrestitutionary policy of last June. The so-called "deliberative process" would *not* "be seriously impaired" by disclosure of the draft to the Court. In fact, the extent to which the April 1 draft was widely circulated within the DOE, (in violation of the Court's Order of 1983)

makes a mockery of that process, particularly insofar as you equate the OHA process with that of a "Special Master." I have never known a Special Master to have his drafts reviewed extensively by persons not under with the Special Master.

In your reply on page 3 of your letter, you state there were "numerous meetings" to discuss the report and the "Statement of Restitutionary Policy". When was that policy prepared and first circulated? Who received it? Was a draft of it provided in any form to the OHA Director at the May 7 or 10 meetings? When was the Director first made aware of the policy? What were the nature of the May 7 and 10 discussions which you attended?

Finally, I note your continued refusal to file my letter with the Court. You state:

> Courts have repeatedly held that the views of individual members of Congress, even if they are committee chairmen, are to be given no weight in construing or applying Federal law, except as they may be part of pre-enactment commentary on legislation being enacted, so that the Courts can discern the views of the Congress as a body at the relevant time of its adoption of legislation.

If this is so, then I wonder why you have declined to make my views known to the Court. If, as you state, the Court will give my views on DOE policy "no weight," so be it. There can no harm to DOE in providing them so they will be before the Court. The Court, of course, is free to reject, ignore, or consider them.

You note that one of the parties attached a copy of my September 3 letter with their motion. That is interesting. However, I prefer that the Government, not a private party, as a courtesy provide my views to the Court. I do not think it unreasonable to ask that you

extend this courtesy to me or any other Member of Congress.

I again urge that you release the April 1 draft to the Court and that you provide my letters to the Court, including this letter.

I request your reply by October 7, 1985.

Sincerely,

/s/ John D. Dingell
JOHN D. DINGELL
Chairman
Subcommittee on
Oversight and Invesigations

Enclosure (1)

cc: Honorable James T. Broyhill
Ranking Minority Member

Honorable John S. Herrington, Secretary
Department of Energy

Mr. Marshall Staunton, Acting Administrator
Economic Regulatory Administration
Department of Energy

Honorable George B. Breznay, Director
Office of Hearings and Appeals
Department of Energy

Honorable Charles A. Bowsher, Comptroller General
General Accounting Office

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

M.D.L. No. 378

IN RE: THE DEPARTMENT OF ENERGY
STRIPPER WELL EXEMPTION LITIGATION

ORDER

Upon consideration of the Motion to Amend Scheduling Order and the Request for Production of Documents and Motion to Shorten the Time to Respond filed herein by the Refiner-Plaintiffs;

IT IS HEREBY ORDERED:

1. The Department of Energy shall respond to the Refiner-Plaintiffs' Request for Production of Documents within ten (10) days from the date hereof.

2. The time for all parties to comment on or object to the Report of the Office of Hearings and Appeals is hereby extended thirty (30) days to October 23, 1985.

IT IS BY THE COURT SO ORDERED.

DATED September 12, 1985.

/s/ Frank G. Theis
FRANK G. THEIS
U.S. District Court
Senior Judge

EXCERPT (pp. 3-4) FROM DOE OPPOSITION TO PETITIONERS' MOTION TO FILE FURTHER PETITION FOR REHEARING OUT OF TIME IN THE COURT OF APPEALS

In addition, Intervenor-Refiners' "surprise" that other parts of the Department reviewed the preliminary recommendations made by certain OHA employees concerning possible restitutionary mechanisms in a different case is, at best, contrived and does not present a change of fact or law. From the beginning, DOE acknowledged in that case that OHA would consult with other parts of the agency in preparing its report in the *Stripper Well* case.[4]

Indeed, the district court in that case explicitly sanctioned that consultation regarding "whether intelligible progress can be made" on tracing the total or partial impact of the overcharges and "how best to achieve restitution" as not only appropriate but necessary. *In re: the Department of Energy Stripper Well Exemption Litigation*, 608 F. Supp. 1104, 1107 (D. Kan. 1985).

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[4] *See, e.g.*, Department of Energy's Response to Plaintiffs' Second Set of Interrogatories and Request for Production of Documents at 11 ("The DOE's Office of General Counsel is authorized to provide legal advice to OHA in connection with Subpart V refund proceedings, and has generally done so."), 12 (DOE agreed that "the Secretary of Energy or his delegate has the authority to veto, concur in, or modify a tentative, preliminary, draft, or final decision in a Subpart V proceeding or in any other type of refund distribution proceeding conducted by OHA."); Transcript of June 6, 1983 Hearing at 52 (counsel for DOE acknowledges that "some DOE attorneys advise OHA [in refund proceedings], that's no secret."), at 58 (counsel for plaintiffs, which includes many Intervenor Refiners in this case, complains that "OHA is not an independent arm, . . . but instead is subject to various restrictions from the Secretary of Energy and is also subject to advice from the Office of General Counsel").

Accordingly, Intervenor Refiners' motion for leave to file further petition should be denied.

Respectfully submitted,

/s/ Thomas C. Newkirk
THOMAS C. NEWKIRK
MARCIA K. SOWLES
ARTHUR S. WEISSBRODT
JOSEPH L. GIBSON
GILBERT T. RENAUT
RODNEY SOLENBERGER
Office of Judicial Litigation
Economic Regulatory Admin.
Department of Energy
1000 Independence Ave., S.W.
Washington, D.C. 20585
(202) 252-5127